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IN THE
COURT OF APPEALS OF INDIANA

ANTHONY BERNARD CHANDLER,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 02A03-0702-PC-59
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-9909-CF-447

October 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner Anthony Bernard Chandler ("Chandler") appeals the denial of his petition for post-conviction relief, which challenged his convictions for two counts of Child Molesting, one as a Class B felony and one as a Class C felony.[1] We affirm.

Issues

Chandler presents four issues for review. We address the following restated and consolidated issues:

I. Whether he received procedural due process in the post-conviction court; and

II. Whether the post-conviction court erroneously denied Chandler relief upon his claims of ineffective assistance of trial and appellate counsel.[2]

Facts and Procedural History

On February 27, 2001, Chandler was convicted of Class B felony child molesting for performing sexual intercourse with T.S., the daughter of Chandler's girlfriend.[3] He was also convicted of Class C felony child molesting for fondling T.S. On March 27, 2001, he was sentenced to twenty years for the Class B conviction and eight years for the Class C conviction, to be served consecutively. Chandler appealed and this Court affirmed his convictions. Chandler v. State, No. 02A03-0105-CR-149 (Ind. Ct. App. Nov. 26, 2001).

On November 20, 2002, Chandler filed a pro-se petition for post-conviction relief. On

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[1] Ind. Code § 35-42-4-3.

[2] We do not address Chandler's freestanding claim of "manifest injustice." See Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002) (holding that, generally, complaints that something went awry at trial are cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal).

December 16, 2002, a public defender entered an appearance on Chandler's behalf. On January 11, 2006, the public defender filed his motion to withdraw and certification of investigation and consultation; the motion to withdraw was granted on January 13, 2006. On February 14, 2006, the post-conviction court granted the State's motion to have the matter submitted via affidavit.

Thereafter, Chandler filed motions for subpoenas, a motion for the appointment of a pediatric expert, and a motion to compel answers to interrogatories. The motions were denied. A motion to compel discovery was granted in part. On June 13, 2006, the post-conviction court entered an order finding that trial counsel had substantially complied with the post-conviction court's discovery order.

On August 17, 2006, Chandler filed an amended petition for post-conviction relief, an affidavit, and a request for an evidentiary hearing. On October 31, 2006, the State filed an answer to the amended petition. On December 14, 2006, the post-conviction court adopted the State's answer as its findings of fact and conclusions of law and denied Chandler's petition for post-conviction relief. Chandler now appeals.

Discussion and Decision

Standard of Review

Post-conviction proceedings are civil in nature and a defendant must establish his claims by a preponderance of the evidence. Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000). A petitioner who has been denied post-conviction relief faces a rigorous standard of

[3] Chandler was acquitted of three additional counts of child molesting alleged to have been committed against D.R.

review. Benefiel v. State, 716 N.E.2d 906, 911-12 (Ind. 1999). To prevail on appeal, the petitioner must demonstrate that the evidence as a whole "leads unerringly and unmistakably to a decision opposite that reached by the trial court." Prowell v. State, 741 N.E.2d 704, 708 (Ind. 2001). Stated differently, we will disturb a post-conviction court's decision only where the evidence is uncontradicted and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion. Miller v. State, 702 N.E.2d 1053, 1058 (Ind. 1998).

I. Procedural Due Process

Chandler asserts he was deprived of adequate means to establish his claims of ineffective assistance of trial and appellate counsel. He contends that he was entitled to an evidentiary hearing to address factual issues. He also claims that the post-conviction court erroneously declined to issue subpoenas for witnesses and denied his "Motion of Ex Parte Request for the Court's Assistance to Complete Investigation for Post-Conviction Proceedings" filed March 20, 2006. He also asserts his entitlement to funds to hire an investigator and experts to depose Dr. David Gemmill (who conducted a physical examination of T.S. and testified regarding his findings at trial) and Allen Stubblefield (T.S.'s father).

The post-conviction rules do not require an evidentiary hearing in all cases. Post-Conviction Rule 9 provides in relevant part:

> (a) Upon receiving a copy of the petition, including an affidavit of indigency, from the clerk of the court, the Public Defender may represent any petitioner committed to the Indiana Department of Correction in all proceedings under this Rule, including appeal, if the Public Defender determines the proceedings are meritorious and in the interests of justice. The Public Defender may refuse representation in any case where the conviction or

> sentence being challenged has no present penal consequences. Petitioner retains the right to employ his own counsel or to proceed pro se, but the court is not required to appoint counsel for a petitioner other than the Public Defender.
>
> (b) In the event petitioner elects to proceed pro se, the court at its discretion may order the cause submitted upon affidavit. It need not order the personal presence of the petitioner unless his presence is required for a full and fair determination of the issues raised at an evidentiary hearing. If the pro se petitioner requests issuance of subpoenas for witnesses at an evidentiary hearing, the petitioner shall specifically state by affidavit the reason the witness' testimony is required and the substance of the witness' expected testimony. If the court finds the witness' testimony would be relevant and probative, the court shall order that the subpoena be issued. . . .
>
> (c) Counsel shall confer with petitioner and ascertain all grounds for relief under this rule, amending the petition if necessary to include any grounds not included by petitioner in the original petition. In the event that counsel determines the proceeding is not meritorious or in the interests of justice, before or after an evidentiary hearing is held, counsel shall file with the court counsel's withdrawal of appearance, accompanied by counsel's certification that 1) the petitioner has been consulted regarding grounds for relief in his pro se petition and any other possible grounds and 2) appropriate investigation, including but not limited to review of the guilty plea or trial and sentencing records, has been conducted. Petitioner shall be provided personally with an explanation of the reasons for withdrawal. Petitioner retains the right to proceed pro se, in forma pauperis if indigent, after counsel withdraws.

If the post-conviction court orders the cause submitted by affidavit, "it is the court's prerogative to determine whether an evidentiary hearing is required, along with the petitioner's personal presence, to achieve a full and fair determination of the issues raised." Smith v. State, 822 N.E.2d 193, 201 (Ind. Ct. App. 2005), trans. denied. We will reverse that decision only where the petitioner demonstrates an abuse of discretion by the post-conviction court. Id. at 199.

Here, following the withdrawal of appearance of the deputy from the Indiana Public Defender's Office, the post-conviction court ordered the parties to proceed by affidavit

pursuant to Indiana Post-Conviction Rule 1(9)(b). Chandler did not submit affidavits from his trial or appellate counsel, but filed his Request for Issuance of Subpoenas in Post-Conviction Proceedings and attached affidavits in support of his request for subpoenas. Post-Conviction Rule 1(9)(b) authorizes the issuance of subpoenas for witnesses but requires an affidavit setting forth the substance of the expected testimony. The post-conviction court declined to issue the subpoenas.

Chandler claims a hearing was necessary in his case because "appellate counsel would not provide him with an affidavit." Appellant's Brief at 11. The State contends that Chandler failed to file an affidavit setting forth the substance of counsel's expected testimony because Chandler "merely asked questions rather than supplying any purported substance of the expected testimony." State's Brief at 10.

Chandler requested that a subpoena be issued for his appellate counsel Thomas Allen. In his supporting Affidavit, Chandler indicated that Thomas was expected to testify as follows: "why he didn't appeal defendant's conviction for count v? why he didn't raise ineffective assistance of trial counsel on direct appeal? Why he didn't order final jury instructions?" (App. 182.) Chandler averred that Thomas' testimony was required because "Defendant is claiming ineffective assistance of appellate counsel and he completed direct appeal." (App. 183.) The affidavit advises the post-conviction court that Chandler has raised an issue of ineffectiveness of appellate counsel and seeks to examine appellate counsel regarding his representation.

Nevertheless, Chandler has not shown how an evidentiary hearing would have aided

him. His affidavit did not reveal what testimony appellate counsel could offer supporting a claim of his own ineffectiveness or that of trial counsel. Chandler identified no other potential witness to offer expert testimony on counsel's performance. The complete trial record, highly relevant if not essential to a review of the performance of counsel, apparently was not submitted as a post-conviction exhibit (although excerpts were). We find no abuse of discretion in the post-conviction court's decision not to conduct an evidentiary hearing.

Chandler's argument concerning the denial of expert assistance reflects his quest for "unspecified exculpatory evidence not presented at trial which could aid him in the prosecution of his post-conviction petition." Appellant's Brief at 7. His motion for public funds for investigation and expert assistance requested a pediatrician "specializing in child abuse to examine all medical documents" and averred "there may be a false memory of molestation created." (App. 191.) However, a bald assertion of possible false memory does not demonstrate Chandler's entitlement to experts at public expense in post-conviction proceedings. "[I]t is an abuse of the post-conviction process to use it to investigate possible claims rather than vindicate actual claims." Roche v. State, 690 N.E.2d 1115, 1133 (Ind. 1997).

Too, Chandler's affidavits in support of his requests for subpoenas were speculative and exploratory, and failed to state the substance of anticipated testimony. For example, Chandler claimed that Dr. Gemmill had been coerced into his testimony, and asserted that T.S.'s biological father "could help with the truth." (App. 177.) The post-conviction court was not required to assist Chandler in pursuing potential and speculative challenges to the

credibility of trial witnesses. Post-conviction proceedings are not designed to permit attacks upon trial witness credibility, but rather to address issues demonstrably unavailable at trial and on direct appeal. Sanders, 765 N.E.2d at 592. Based upon our review of Chandler's motions and affidavits, he essentially sought to re-litigate his trial. We conclude that Chandler was not deprived of procedural due process.

II. Effectiveness of Counsel

Chandler contends he was denied the effective assistance of both trial and appellate counsel. Effectiveness of counsel is a mixed question of law and fact. Strickland v. Washington, 466 U.S. 668, 698 (1984). We evaluate Sixth Amendment claims of ineffective assistance under the two-part test announced in Strickland. Id. To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate both deficient performance and resulting prejudice. Dobbins v. State, 721 N.E.2d 867, 873 (Ind. 1999) (citing Strickland, 466 U.S. at 687). Deficient performance is that which falls below an objective standard of reasonableness. Strickland, 466 U.S. at 687; see also Douglas v. State, 663 N.E.2d 1153, 1154 (Ind. 1996). Prejudice exists when a claimant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; see also Cook v. State, 675 N.E.2d 687, 692 (Ind. 1996). The two prongs of the Strickland test are separate and independent inquiries. Strickland, 466 U.S. at 697. Thus, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Id.

Moreover, under the Strickland test, counsel's performance is presumed effective. Douglas, 663 N.E.2d at 1154. A petitioner must present convincing evidence to overcome the strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690; Broome v. State, 694 N.E.2d 280, 281 (Ind. 1998).

In his petition for post-conviction relief, Chandler contended that his trial counsel was ineffective for failing to object when the State moved to amend Count IV as to the date of the offense.[4] On direct appeal, however, this Court held that the trial court did not err when it allowed the State to amend Count IV of the information after it had rested its case. Chandler, slip op. at 2. Thus, an objection by counsel would not have been availing. Counsel's failure to object was not prejudicial to Chandler.

Chandler claimed that his trial counsel should have moved for a directed verdict on the Class C felony because he was subjected to double jeopardy under the actual evidence test of Richardson v. State, 717 N.E.2d 32 (Ind. 1999). Article I, Section Fourteen of the Indiana Constitution provides that "no person shall be put in jeopardy twice for the same offense." In Richardson, the Court held that the Indiana Double Jeopardy Clause is violated if there is "a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." 717 N.E.2d at 53. The possibility must be reasonable, not speculative or remote. Boatright v. State, 759 N.E.2d 1038, 1044 (Ind.

2001). The Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the elements of one offense also establish one or several, but less than all, of the essential elements of a second offense. Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002).

Here, T.S. testified that Chandler "had sex with [her]" and described this as Chandler putting his "hotdog" (identified as the part with which he "used the bathroom") into "her part" that she "used to pee." (Trial Tr. 183-85). T.S. testified further that Chandler "rubbed his hand inside [her] private part." (Trial Tr. 224.) Thus, the separate convictions for child molesting by intercourse and child molesting by fondling do not rest upon the same evidentiary facts. Trial counsel was not ineffective in failing to raise a double jeopardy challenge.

Chandler also claimed that trial counsel should have presented T.S.'s father, Allen Stubblefield, as a defense witness. As explained in his petition for post-conviction relief, Chandler apparently believes that Stubblefield was present when T.S. was examined by Dr. G.R. Beasley in 1996 and was "told not to return his daughter to a possible abusive situation." (App. 221.) It is unclear how such testimony would have been helpful to Chandler's defense or how trial counsel's failure to elicit evidence of this nature was prejudicial to Chandler. Chandler also opined that his trial counsel should have engaged in broader discovery, and sought the assistance of a child psychologist and a pediatrician familiar with child abuse. However, bald assertions of counsel's omissions or mistakes are inadequate to support a post-conviction claim of ineffectiveness of counsel. See Tapia v.

[4] Count IV was also amended to allege a Class B felony, as opposed to a Class A felony, was committed, because evidence adduced at trial indicated that the offense was committed before Chandler reached the age

State, 753 N.E.2d 581, 587 (Ind. 2001). Chandler has not demonstrated that he received ineffective assistance of trial counsel.

Chandler further claims that his appellate counsel was ineffective for failing to allege the ineffectiveness of trial counsel with regard to the amendment of Count IV, and for failing to raise issues regarding double jeopardy and jury instruction.

Appellate ineffectiveness claims are evaluated under the standard of Strickland, 466 U.S. at 668. Appellate courts should be particularly deferential to an appellate counsel's strategic decision to include or exclude issues, unless the decision was "unquestionably unreasonable." Bieghler v. State, 690 N.E.2d 188, 194 (Ind. 1997). To prevail on his claim of ineffective assistance of appellate counsel, Chandler must show that counsel failed to present a significant and obvious issue and that this failure cannot be explained by reasonable strategy. See Stevens v. State, 770 N.E.2d 739, 760 (Ind. 2002).

Appellate counsel did not allege that trial counsel was ineffective for failing to object to the amendment of Count IV. However, appellate counsel directly challenged the trial court's decision to permit the amendment of Count IV. This issue was decided adversely to Chandler and is res judicata. See Trueblood v. State, 715 N.E.2d 1242, 1248 (Ind. 1999) (stating that an issue raised on appeal and decided adversely to the petitioner is res judicata).

Appellate counsel did not raise a double jeopardy argument. However, as previously discussed, the record of the victim's testimony does not support Chandler's double jeopardy contention. Accordingly, appellate counsel was not ineffective in failing to raise a double jeopardy issue.

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of twenty-one.

Finally, Chandler complains that appellate counsel did not challenge the use of Final Instruction 15, which provided: "Time of occurrence of an act is not an element nor is it essential to proving a criminal violation in crimes involving children." (App. 32.) The instruction is not a misstatement of the law. In most circumstances, time is not of the essence in the crime of child molesting. Barger v. State, 587 N.E.2d 1304, 1307 (Ind. 1992), reh'g denied. Rather, the exact date is only important in limited circumstances, such as where the victim's age at the time of the offense falls at or near the dividing line between classes of felonies. Id. Appellate counsel did not overlook a significant and obvious issue for appeal.

Chandler did not overcome the presumption that he received effective assistance of trial and appellate counsel. Accordingly, he was properly denied post-conviction relief.

Affirmed.

BAKER, C.J., and VAIDIK, J., concur.